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Clerk, U.S. District Court, ILCD

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February 3, 2010

Hon. Michael P. McCuskey  
Chief United States District Judge  
318 U.S. Courthouse  
201 S. Vine Street  
Urbana, IL 61802

RE: IKO Roofing Shingle Products Liability Litigation  
MDL No. 2104

Dear Judge McCuskey:

On behalf of Plaintiffs and the Defendants, I am enclosing a copy of the Joint Preliminary Report which was to be sent to you and not filed with the Clerk per your Order No. 2 dated December 17, 2009.

We have today e-filed a Joint Case Management Conference Statement and proposed Order, and look forward to our upcoming conference on February 17, 2010.

Sincerely,

s/ Jon D. Robinson

Jon D. Robinson

JDR/djw

Enclosure

cc: All Counsel of Record

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS  
URBANA DIVISION**

IN RE:

# IKO ROOFING SHINGLE PRODUCTS LIABILITY LITIGATION

MDL No. 2104

THIS DOCUMENT RELATES TO  
ALL ACTIONS

## JOINT PRELIMINARY REPORT

Pursuant to the Court's Order No. 2 dated December 17, 2009, the parties jointly submit this Preliminary Report. This Preliminary Report provides the Court (1) a brief written statement indicating the parties' preliminary understanding of the facts involved in the litigation and the critical factual and legal issues, (2) identifies any pending motions, and (3) lists all related cases pending in state or federal court and provides the current status of those cases.

## **I. PRINCIPAL FACTUAL AND LEGAL ISSUES**

Six nearly identical class action complaints have been coordinated and consolidated in this Court for pre-trial purposes pursuant to Federal Rule of Civil Procedure 42(a): (1) *Zanetti v. IKO Manufacturing, Inc.* (D. N.J.); (2) *Czuba v. IKO Manufacturing, Inc.* (W.D. N.Y.); (3) *McNeil v. IKO Manufacturing, Inc.* (N.D. Ill); (4) *Hight v. IKO Manufacturing, Inc.* (W.D. Wash.); (5) *William Curler v. IKO Manufacturing, Inc.* (S.D. Ill); and (6) *Belinda Curler v. IKO Manufacturing, Inc.* (C.D. Ill.).

There are thirteen named Plaintiffs in these six actions. The same five defendants are named in each action. Defendants IKO Manufacturing Inc., IKO Chicago Inc. and IKO Pacific Inc. are United States companies, while defendants IKO Industries Ltd. and IKO Sales, Ltd. are

Canadian companies. The U.S.-based defendants are past or present manufacturers or distributors of IKO asphalt roofing shingles.

Plaintiffs contend that this action is maintainable as a class action based on the facts alleged in the operative complaint and as will be further demonstrated in their Motion for Class Certification. Defendants believe that this action cannot be maintained as a class action because plaintiffs will not be able to carry their burden of demonstrating all of the elements necessary for certification.

Plaintiffs allege the following: they are property owners who allege that Defendants designed, manufactured, distributed, or sold them roofing shingles that were defective and unsuited for their intended purpose. Defendants represented that their roofing shingles would last for 20, 25, 30, 40, or more years. Defendants represented that their shingles “[set] the standard” in quality, “enhanced curb appeal” that “could even boost the property’s resale value,” have “proven durability,” and are backed by an “Iron-Clad” warranty. Plaintiffs installed Defendants’ roofing shingles on their homes or other structures expecting the shingles to last the length of the warranty and not prematurely crack, curl, pit, crumble, leak and otherwise prematurely fail.

Plaintiffs further allege: that after installation, the roofing shingles rapidly deteriorated and their useful life ended many years before the warranty period guaranteed by the Defendants. Plaintiffs contend the roofing shingles sold to Plaintiffs by Defendants did not conform to the specifications promised to them and reasonably expected by them. As a result of the design or manufacturing defects in the roofing shingles, the IKO shingles installed on Plaintiffs structures cracked, curled, degranulated, or exhibited other signs of premature failure. Plaintiffs have suffered damage to their property and the underlying structure. Damage caused by the failing shingles includes, but is not limited to: damage to underlying felt, damage to structural roof

components, damage to plaster and sheetrock, damage to walls and ceiling structural components, decreased curb appeal, or decreased property value.

Plaintiffs further allege: plaintiffs contacted Defendants' warranty center to seek redress from the company. The company either summarily denied compensation to the claimants, or required them to submit a lengthy warranty claim that included, among other things, that Plaintiffs remove a shingle sample from their roofs. Even if the claimant submitted a warranty claim, Defendants either denied the claim without any offer of compensation, or offered inadequate compensation. In some cases, the Defendants' remedy was to reimburse claimants for a bottle of glue to patch shingles that were so badly deteriorated that they were falling off the roof. In other cases, the company offered monetary compensation at a rate that was a fraction of the cost of properly replacing or repairing the damaged roof. In all cases in which the company offered any remedy, it required claimants to execute a release of any and all claims, including future claims. Plaintiffs filed this lawsuit after Defendants refused to sufficiently compensate them for the damages they incurred as a result of incorporating Defendants' roofing shingles into their property.

The basic allegations of each Plaintiff are as follows:

1. Plaintiff Debra Zanetti of New Jersey alleges that she purchased a new home outfitted with IKO Shingles in approximately 1997 and discovered defects in approximately 2004.
2. Plaintiff Daniel Trongone of New Jersey alleges that he purchased a new home outfitted with IKO shingles in approximately 1996 and discovered defects in approximately 2006.
3. Plaintiff Gerald Czuba of New York alleges that he purchased a new home outfitted with IKO shingles in approximately 1997 and discovered defects in approximately 2006.

4. Plaintiff Curtis Czajka of New York alleges that he purchased a new home outfitted with IKO shingles in approximately 1991 and discovered defects in approximately 2005.
5. Plaintiff Richard Peleckis of New York alleges that he purchased a new home outfitted with IKO shingles in approximately 1997 and discovered defects in approximately 2006.
6. Plaintiff Pamela McNeil of Michigan alleges that she purchased a new home outfitted with IKO shingles in approximately 2001 and discovered defects in approximately 2005.
7. Plaintiff Dr. James Cantwil of Michigan alleges that he purchased a new home outfitted with IKO shingles in approximately 1995 and discovered defects in approximately 2008.
8. Plaintiff Michael Hight of Ohio alleges that he purchased a new home outfitted with IKO shingles in approximately 1998 and discovered defects in approximately 2009.
9. Plaintiff Michael Augustine of New York allegedly purchased shingles in approximately 1996 and discovered the defects in approximately 2008.
10. Plaintiff William Curler of Iowa alleges that he “outfitted his home” with IKO shingles in approximately 2001 and discovered defects in approximately 2002.
11. Plaintiff Belinda Curler of Iowa alleges that she outfitted her home with IKO shingles in approximately 2001 and discovered defects in approximately 2004.
12. Plaintiff David Greenough of Vermont alleges that he purchased a new home outfitted with IKO shingles in approximately 1994 and discovered defects in approximately 2007.
13. Plaintiff Vincent Dion of Massachusetts alleges that he purchased a home outfitted with IKO shingles in approximately 1996, installed additional shingles in approximately 2004 when he built an addition to his home, and discovered defects in approximately 2009.

Plaintiffs seek to certify a nationwide class. The class definitions in each of the actions are similar: “All individuals and entities that have owned, own, or acquired homes, residences, buildings or other structures physically located in [State/U.S.] on which IKO Shingles are or have been installed since 1979.”

Although not identical across the various complaints, Plaintiffs' causes of action are: (1) negligence; (2) strict products liability; (3) breach of express warranty; (4) breach of implied warranty; (5) violation of state consumer protection statutes; (6) misrepresentation or fraudulent concealment; (7) breach of contract; and (8) unjust enrichment.

Defendants deny that IKO shingles are in any way defective, deny that IKO shingles "fail prematurely," deny that they made any misrepresentations or material omissions in the sale of IKO shingles, and deny that a class action is appropriate. The U.S.-based defendants have manufactured or sold dozens of different brands of IKO shingles during the 30 years of the proposed class period, including Renaissance XL, Chateau, Aristocrat, Total, AM Armour Seal, Superplus, Armour Lock, Royal Victorian, Imperial Seal, Vista, Marathon 20, Marathon 25, Gentry 25 AR, Marathon 25 AR, Marathon Ultra AR, Gentry Ultra AR, Cambridge 30, Cambridge 30 AR, Cathedral SBS, Roofshake 40, Crowne Slate, Cambridge LT, and Armourshake. IKO shingles come in a variety of materials, designs and sizes, including three-tabbed organic, three-tabbed fiberglass, laminated organic and laminated fiberglass. Marketing materials for each of these shingles have varied greatly over the 30 years of the proposed class period.

IKO shingles generally are sold to wholesalers and dealers, who sell them to contractors or roofers and to retailers (such as Menard's) who sell them to contractors, roofers and some consumers, who in turn install them on homes. Defendants contend that most consumers are not even aware of the brand of shingles on their homes.

Each IKO shingle is sold with a limited warranty. The terms of these limited warranties currently range from 20 years to limited lifetime warranties. Each of these limited warranties carries an "Iron Clad" protection period during which the shingles will be repaired or replaced

free of charge, including labor costs. That Iron Clad protection period currently ranges from 3 years to 15 years. After the expiration of the Iron Clad protection period, IKO's obligation is limited to a prorated amount of the current value of replacement shingles. The prorated amount is based on the age of the shingle, *i.e.*, the amount decreases as the shingle ages.

IKO's warranties contain certain exclusions from coverage, including without limitation faulty installation, inadequate ventilation, and discoloration, as well as certain other limitations on a purchaser's right to make a warranty claim. Plaintiffs contend that such exclusions are unenforceable.

Below is a preliminary summary of the critical legal and factual issues in this litigation.

**A. Principal Legal Issues**

Defendants anticipate making a number of legal arguments in response to the causes of action asserted by Plaintiffs. At this early stage, the preliminary critical legal issues in this case include:

1. Whether the Court has personal jurisdiction over IKO Sales, Ltd. and IKO Industries Ltd., which are Canadian entities;
2. Whether IKO shingles are defective in that they fail prematurely and are not suitable for use as an exterior roofing product for the length of the time advertised, marketed, or warranted;
3. Whether the allegedly false or misleading statements made by IKO – such as “[t]ime tested and true,” and “Setting the Standard [for] quality, durability, and innovation” – are non-actionable puffery;
4. Whether IKO shingles are defectively designed or manufactured;
5. Whether one or more of the claims of one or more of the named Plaintiffs are barred by the governing statute of limitations, the express one-year limitation of actions contained in the warranties, or the 30-day limitation on express warranty claims contained in the warranties;
6. Whether Defendants owed a duty to Plaintiffs and the putative class to exercise reasonable and ordinary care in the formulation, testing, design, manufacture, and marketing of the shingles;

7. Whether the breach of express and implied warranty claims of one or more of the named Plaintiffs are barred due to the Plaintiffs' failure to provide IKO with pre-suit notice;
8. Whether Defendants knew or should have known the allegedly defective nature of the shingles;
9. Whether the disclaimer of implied warranties in the IKO warranties is unenforceable;
10. Whether the shingles failed to perform in accordance with the reasonable expectations of ordinary consumers;
11. Whether Plaintiffs' fraud-based claims are sufficiently pled or whether they are disguised contract claims;
12. Whether the risks of the shingle's failure outweigh the benefits, if any, of their design;
13. Whether the economic loss rule bars Plaintiffs' negligence and strict products liability claims;
14. Whether Defendants properly warned consumers about the risk of premature failure;
15. Whether IKO shingles are unreasonably dangerous;
16. Whether the shingles fail to perform as advertised or warranted;
17. Whether Plaintiffs' breach of contract claims are duplicative of Plaintiffs' breach of express warranty claims;
18. Whether Defendants' conduct in marketing and selling its shingles was unfair or deceptive;
19. Whether Plaintiffs' unjust enrichment claims are barred due to the existence of an express contract or an adequate legal remedy;
20. Whether Plaintiffs and the Class are entitled to compensatory, exemplary and statutory damages, and the amount of such damages;
21. Whether the various requirements and limitations of IKO's warranties are enforceable, and if so, whether Plaintiffs complied with the terms of IKO's warranties;
22. Whether Plaintiffs have standing to assert the alleged claims on behalf of different homeowners with different brands of IKO shingles; and



23. Whether Plaintiffs may properly maintain this litigation as a class action pursuant to Fed. R. Civ. P. 23.

In addition, critical legal issues with respect to Plaintiffs' request for certification of a nationwide class include:

1. Whether Plaintiffs can meet their burden of showing that the members of the putative class are sufficiently identifiable where the defendants do not sell directly to consumers.
2. Whether Plaintiffs can meet their burden of establishing the requirements of Federal Rule of Civil Procedure 23, including issues such as:
  - (i) Whether common issues of fact predominate over individualized issues, including whether the shingle failed or showed signs of deterioration as a result of a defect in the manufacture, design or testing of the shingle as Plaintiffs allege or for some other reason such as how the shingles were installed or the weather conditions to which the roof was exposed over time.
  - (ii) Whether common issues of fact predominate over individualized issues where different representations were made in connection with different brands of shingles throughout the class period.
  - (iii) Whether the class action device is superior to other methods of adjudicating putative class members claims, including the existing IKO warranty claims process.
  - (iv) Whether this class action is manageable based on the proof that will be necessary and the variations in the law for each of Plaintiffs' claims.

**B. Principal Factual Issues**

At this early stage, the preliminary critical factual issues that may need to be resolved in this case include:

1. What representations or information, if any, each Plaintiff and putative class member received regarding IKO shingles from defendants and other sources;
2. Whether IKO shingles have a common manufacturing or design defect;
3. Whether Plaintiffs and putative class member relied on any representations or information regarding IKO shingles from defendants or other sources in purchasing IKO shingles;

4. Whether IKO shingles are defective where they show signs of cracking, curling, blistering or other deterioration over time;
5. Whether IKO shingles fail prematurely;
6. Whether the defendants breached any duty to Plaintiffs in the design, manufacture or testing of IKO shingles;
7. The circumstances in which each Plaintiff or putative class member purchased a home or other building with IKO shingles, including whether the home or building was new or used, the identity of the contractor who installed the shingles, the type of shingle installed, the date of purchase, the date of installation, and the factors considered by the contractor or homeowner in selecting the particular shingles used;
8. The circumstances surrounding the installation of the shingles for each Plaintiff and putative class member;
9. Whether environmental conditions affect the performance of IKO shingles;
10. Whether other circumstances to which the shingles of each Plaintiff and putative class member were exposed since the date of installation affect the performance of IKO shingles;
11. The nature of the alleged deficiencies in the shingles for each Plaintiff and putative class member (*e.g.*, curling, cracking, blistering, other signs of deterioration, or some combination thereof);
12. Whether a single cause is responsible for the curling, cracking, blistering, or other deterioration of IKO shingles;
13. The reasons that the IKO shingles of each Plaintiff and putative class member failed, if at all, and the timing and progression of that failure;
14. Whether the Plaintiffs or putative class members failed to comply with the terms of IKO's limited warranties; and
15. The nature and amount of property damages or money damages, if any, for each Plaintiff or putative class member.

## **II. LIST OF PENDING MOTIONS**

No motions are pending at this time.

### III. LIST OF RELATED CASES

The following cases have been coordinated and consolidated in this Court for pre-trial purposes pursuant to Federal Rule of Civil Procedure 42(a):

16. *Zanetti v. IKO Manufacturing, Inc.*, Case No. 09-cv-2017 (D.N.J.)
17. *Czuba v. IKO Manufacturing, Inc.*, Case No. 09-cv-0409 (W.D.N.Y.)
18. *McNeil v. IKO Manufacturing, Inc.*, Case No. 09-cv-4443 (N.D. Ill)
19. *Hight v. IKO Manufacturing, Inc.*, Case No. 09-cv-0887 (W.D. Wash.)
20. *William Curler v. IKO Manufacturing, Inc.*, Case No. 09-cv-0902 (S.D. Ill)
21. *Belinda Curler v. IKO Manufacturing, Inc.*, Case No. 09-cv-3281 (C.D. Ill.)

In addition, several single-plaintiff lawsuits for breach of warranty are pending in some state courts. The following related class proceedings are currently pending in Canada:

1. *Brenda Davies v. IKO Industries, Ltd., IKO Sales Limited, Canroof Corporation Inc., GH international Inc., Bramcal Productions Inc., and I.G. Machine & Fibers Ltd.*, Action No. 1001.00132, In the Court of Queen's Bench of Alberta (Calgary, Alberta).
2. *Brenda White v. IKO Industries, Ltd., IKO Sales Limited, Canroof Corporation Inc., GH international Inc., Bramcal Productions Inc., and I.G. Machine & Fibers Ltd.*, cv-09-00005758-CP, Ontario Superior Court of Justice (Brampton, Ontario).

Dated: February 3, 2010

Jointly submitted,

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